Nos. 84-518 and 84-710

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT W. JOHNSON, ET AL., PETITIONERS

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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QUESTION PRESENTED

Whether the City of Baltimore's plan requiring involuntary retirement of its firefighters at ages 55 and 60 satisfies the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*, in the absence of a factual showing that age is a bona fide occupational qualification for the job, solely because a federal civil service retirement statute, 5 U.S.C. 8335(b), generally requires the retirement of *federal* firefighters at age 55.

PARTIES TO THE PROCEEDING

August T. Stern, Jr., Thomas C. Doyle, Mitchell Paris, Robert L. Robey, and James Lee Porter are also petitioners in No. 84-518. Hyman A. Pressman, Donald D. Pomerleau, Calhoun Bond, Edward C. Heckrotte, Sr., Charles Daugherty, Paul C. Wolman, Jr. and Curt Heinfelden are Members of the Board of Trustees of the Fire and Police Employees Retirement System of the City of Baltimore. They were defendants in the trial court and are respondents here.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a)[1] is reported at 731 F.2d 20[illegible] The opinion of the district court (Pet. App. 22a-53a) is reported at 515 F. Supp. 1287.

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[1] "Pet. App." refers to the appendix to the petition in No. 84-710.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1984. A petition for rehearing was denied on June 29, 1984 (Pet. App. 21a). On September 20, 1984, the Chief Justice extended the EEOC's time within which to file a petition for a writ of certiorari to and including November 26, 1984. The petitions for a writ of certiorari were filed on September 27, 1984 (No. 84-518), and November 2, 1984 (No. 84-710), and were granted on January 14, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 4 of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 623, provides in pertinent part:

> (a) Employer Practices
> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> * * * * *
>
> (f) Lawful practices; age an occupational qualification; other reasonable factors; seniority system employee benefit plans; discharge or discipline for good cause
>
> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or
>
> (3) to discharge or otherwise discipline an individual for good cause.

5 U.S.C. 8335(b) provides:

> A law enforcement officer or a firefighter who is otherwise eligible for immediate retirement under section 8336(c) of this title shall be separated from the service on the last day of the month in which he becomes 55 years of age or completes 20 years of service if then over that age. The head of the agency, when in his judgment the public interest so requires, may exempt such an employee from automatic separation under this subsection until that employee becomes 60 years of age. The employing office shall notify the employee in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the

consent of the employee, until the last day of the month in which the 60-day notice expires.

Article 22, Section 34(a) of the Baltimore, Md. Code (1983) is reproduced at J.A. 3.

STATEMENT

1. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, prohibits employers from discriminating against persons aged 40 to 70 on the basis of age by, inter alia, discharging them or requiring them to retire involuntarily. §§ 4(a)(1) and 12(a) of the ADEA, 29 U.S.C. 623 (a)(1) and 631(a). Termination prior to age 70 may be required on the basis of an employee's age only where age has been shown to be "a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of a particular business * * *." § 4(f)(1), 29 U.S.C. 623(f)(1). In 1974, the ADEA was amended to extend these prohibitions to state and local government employers. §§ 11(b), 15, 29 U.S.C. 630(b), 633a. In 1978, the ADEA was amended again to make clear that mandatory retirement before the age of 70 is prohibited, absent proof of a BFOQ, even if accomplished pursuant to a bona fide pension plan. Pub. L. No. 95-256, § 2(a), 92 Stat. 189; see § 4(f)(2), 29 U.S.C. 623 (f)(2).

2. Six firefighters brought this action in the United States District Court for the District of Maryland challenging the City of Baltimore's municipal code provisions that establish an involuntary retirement age for firefighters and police personnel. The plaintiffs claimed that those provisions violate the ADEA. The Equal Employment Opportunity Commission (EEOC) subsequently intervened in support of the plaintiffs. Pet. App. 1a-2a, 22a-23a.

Prior to 1962, Baltimore firefighters were covered by the same retirement system applicable to all Baltimore employees, the Employees Retirement System (ERS), which provided for mandatory retirement at age 70. Pet. App. 2a; J.A. 4. In 1962, the City of Baltimore established the current Fire and Police Employee Retirement System (FPERS) (Baltimore, Md., Code art. 22, § 34 (1983); J.A. 3) for uniformed personnel who previously had been covered by the ERS. The FPERS generally requires all firefighters below the rank of lieutenant to retire at age 55; lieutenants may work until 65. The system makes special provision for firefighters hired before 1962, who were given the option of transferring into the FPERS or remaining in the ERS. Such firefighters below the rank of lieutenant who are presently covered by the FPERS system may work until age 60 (or, in certain limited circumstances, until age 65). § 34(a)(3) and (4); J.A. 3; see Pet. App. 24a-25a. Firefighters hired before 1962 who elected to remain in the ERS may work until age 70 (*id.* at 32a). The plaintiffs here include five firefighters covered by the grandfather clause who are subject to retirement at age 60, and one firefighter hired after 1962 who is subject to retirement at age 55 (*id.* at 25a-26a).[2]

The defendants [hereinafter referred to as respondents] asserted as an affirmative defense that age is a BFOQ for the position of firefighter and

[2] The plaintiffs did not argue that a retirement age of 65 would violate the ADEA. Essentially, they sought the same retirement age applicable to lieutenants. See Pet. App. 39a & n.9.

hence that the mandatory retirement provision was permitted under Section 4(f)(1) of the ADEA, 29 U.S.C. 623(f)(1). A trial was held, at which both sides presented expert and nonexpert testimony in support of their positions regarding the validity of the BFOQ defense. The district court held that respondents had failed to show that age was a bona fide occupational qualification reasonably necessary to the normal operation of the fire department.[3] The court applied the BFOQ test developed in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976), and later adopted by the Fourth Circuit, which required respondents to show (1) that the job qualification was " 'reasonably necessary to the essence of its business' of operating an efficient fire department * * * and (2) that [respondents] have 'reasonable cause, i.e., a factual basis for believing that all or substantially all persons within the class * * * would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis' " (Pet. App. 36a-37a, quoting *Arritt* v. *Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977)).

Specifically, the court rejected respondents' contention that substantially all firefighters would be unable to perform their duties safely and efficiently after they reached the age of 60.[4] With respect to the

[3] The court also rejected respondents' contentions that application of the ADEA to them violates the Tenth Amendment (Pet. App. 29a-31a) and that the five plaintiffs who had elected to be covered by the FPERS had thereby waived the present ADEA claim (*id.* at 31a-34a).

[4] The district court's discussion pertained principally to the five plaintiffs who were subject to mandatory retirement at age 60 because of the grandfather clause included in FPERS. The court noted that the conclusion that an age limit of 60 could not be a BFOQ led, a fortiori, to the conclusion that retirement at age 55 could not be justified as a BFOQ (Pet. App. 50a).

five plaintiffs who were over age 60, the court found the evidence "overwhelming that plaintiffs have not only performed satisfactorily since they became sixty, but in most instances their performance has been more than satisfactory and even exceptional" (Pet. App. 40a).[5] The court further found that the "evidence presented indicates that all five of these plaintiffs are today as qualified as younger employees of the Department to perform their duties as firefighters," noting that respondents had not even "sought to introduce any evidence to indicate that any one of the plaintiffs cannot carry out his assigned duties because of physical or other reasons" (*ibid.*).

In addition to the condition of the individual plaintiffs, the court examined the general workings of the Baltimore Fire Department, noting that "historically Baltimore firemen have always worked past [age 60] and even up to age seventy" (Pet. App. 41a). The court found that firefighters who elected in 1962 to remain covered by ERS and therefore worked past age 60 continued to perform their duties satisfactorily and "in no way affected the high caliber of the services performed by the Baltimore City Fire Department" (*ibid.*). The court further found that the lowering of the mandatory retirement age was par-

[5] After plaintiff Johnson's involuntary retirement, the district court, with respondents' consent, entered a temporary restraining order reinstating him to his position and prohibiting future mandatory retirements of the other named plaintiffs. Thus, the plaintiffs continued to serve as firefighters after they reached age 60. See Pet. App. 23a.

ticularly difficult to justify because the burdens undertaken by older firefighters were not as severe as in the past as a result of the shortening of the work week (from 66 hours to 48 hours) and technological improvements over the years, especially the development and use of oxygen breathing apparatus (*id.* at 42a).[6]

Finally, the court rejected respondents' argument that mandatory retirement at age 55 or 60 is the most reliable way of removing employees suffering from coronary disease (Pet. App. 42a-49a). The court concluded that respondents had not met their burden of proving that it is impossible or impractical to deal with the retirement of firefighters over age 60 on an individualized basis, finding the plaintiffs' expert testimony on this point "much more convincing" than that of respondents (*id.* at 43a). The plaintiffs' evidence indicated that chronological age is appropriately considered, but it is not determinative of an individual's ability to perform a firefighter's duties, and that exercise tolerance tests, supplemented by other tests and procedures, can be used at relatively little expense to determine whether a firefighter is physically and medically fit to perform his job (*id.* at 43a-45a). Even respondents' own evidence, the court concluded, indicated that firefighters with cardiac problems can be evaluated on an individualized basis and retired if necessary (*id.* at 46a).

[6] The court also noted that a survey of the fire departments in 30 of the Nation's largest cities indicated that 22 had mandatory retirement ages of 65 or older or no mandatory retirement age at all, three had mandatory retirement ages of between 60 and 65, and four had a mandatory retirement age of 60. Pet. App. 42a & n. 14. Baltimore was alone in requiring retirement at age 55.

3. A divided panel of the court of appeals reversed (Pet. App. 1a-20a).[7] The court did not take issue with the district court's factual findings that respondents had failed to prove that age was a BFOQ for firefighters,[8] but the court held that respondents were entitled to the BFOQ defense as a matter of law. The court of appeals relied on a passage in *EEOC* v. *Wyoming*, 460 U.S. 226, 240 (1983), in which this Court characterized the prohibitions of the ADEA, in conjunction with the BFOQ exception, as not overriding entirely a state's discretion to impose a mandatory retirement age, but rather merely testing that discretion "against a reasonable federal standard" (Pet. App. 5a-6a). Finding a need to "search for a 'reasonable federal standard' " (Pet. App. 6a), the court of appeals located that standard in a federal civil service statute, 5 U.S.C. 8335(b), which requires certain federal law enforcement officers and firefighters to retire at age 55 if they have sufficient years of service to qualify for a pension and their agency does not find that it is in the public interest to continue their employment. The court of appeals held that since Congress had selected age 55 as the retirement date for most federal firefighters, it followed that Congress recognized age 55 as a BFOQ for firefighters. Hence, the court concluded, age 55 necessarily constituted a BFOQ for all state and local firefighters as well, and therefore respondents were not required to

[7] Respondents filed a petition for certiorari before judgment, which was denied. 455 U.S. 944 (1982).

[8] Indeed, the court of appeals characterized the district court's decision as a "thorough, impeccably reasoned opinion" (Pet. App. 8a).

make any factual showing at trial as to the need for a mandatory retirement age of 55. Pet. App. 6a-8a.[9]

The court added that its statutory interpretation establishing age 55 as a per se BFOQ for firefighters was "compelled further" by the desire to avoid "serious constitutional questions" (Pet. App. 9a). The court identified three such questions: (1) whether Section 5 of the Fourteenth Amendment authorized the extension of the ADEA to state and local governments (Pet. App. 8a-10a); (2) whether the Commerce Clause authorized the application of the ADEA to Baltimore firefighters (*id.* at 11a-12a); and (3) whether judicial factfinding concerning the validity of age as a BFOQ would violate the separation of powers doctrine where "Congress has, in 5 U.S.C. § 8335(b), adopted a legislative answer" to that question (*id.* at 13a).

Chief Judge Winter dissented (Pet. App. 16a-20a). He rejected the majority's conclusion that 5 U.S.C. 8335(b) demonstrated a congressional determination that age 55 is a BFOQ for federal firefighters, stating that the language and legislative history of the statute "belie[] the existence of congressional intent * * * to fix age fifty-five as a BFOQ" (Pet. App. 18a). Moreover, Chief Judge Winter stated, whether or not age 55 was established as a BFOQ for federal firefighters is irrelevant to interpreting the ADEA. He pointed out that this Court had already rejected in *EEOC* v. *Wyoming*, *supra*, the argument that Congress's treatment of federal civil service employees could constrict the broad requirements

[9] The court of appeals distinguished *EEOC* v. *Wyoming*, *supra*, which was remanded for a trial on the BFOQ issue, on the grcund that "[n]o comparable federal statute exists insofar as federal game wardens are concerned" (Pet. App. 8a).

of the ADEA. Pet. App. 19a-20a. Chief Judge Winter concluded that "the fact that Congress may require some federal firefighters to retire at age fifty-five does not excuse Baltimore from providing the facts necessary to satisfy" the BFOQ defense (*id.* at 20a).

SUMMARY OF ARGUMENT

A. In furtherance of its goal to encourage the making of employment decisions on the basis of individual abilities rather than age stereotypes, the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, prohibits mandatory retirement prior to age 70. The Act contains one general exception to this prohibition; an employer may discriminate on the basis of age if age is a "bona fide occupational qualification" for the job. 29 U.S.C. 623(f)(1). The BFOQ exception is a narrow one designed to accommodate unusual circumstances to which the Act's strictures should not apply. The essence of the BFOQ defense is a showing that the employer has a "factual basis" for believing that the age-related job qualification is necessary because testing of individual abilities is not possible. This requirement that the employer make a factual showing of the necessity for the age limit comports with the statutory scheme and reflects Congress's expressed understanding of the BFOQ exception, even with respect to hazardous occupations. Thus, the court of appeals' holding that a BFOQ defense is established as a matter of law for a large class of state and local government employees because of a distinct federal civil service statute, without any factual evidence of necessity for the mandatory retirement provisions, is directly contrary to the clear thrust of the ADEA.

This Court's decision in *EEOC* v. *Wyoming*, 460 U.S. 226 (1982), confirms the factual nature of the

BFOQ defense. The Court noted in *Wyoming* that the ADEA did not completely ban a state from imposing mandatory retirement; it simply held the state's action up to a "reasonable federal standard," *i.e.*, the BFOQ exception set forth in the Act. *Id.* at 240. The Court remanded *Wyoming* to allow the State to prove at trial that age was in fact a BFOQ, recognizing that the defense requires a factual showing of necessity. The court of appeals completely misunderstood *Wyoming* in holding that it requires a court to search outside the ADEA for a "reasonable federal standard" to apply to the particular case, a search that here settled on a civil service statute governing federal firefighters. This approach substitutes chaos for the uniform BFOQ standard established by Congress and undermines the basic structure of the ADEA by permitting mandatory retirement in the absence of a factual showing that age is a BFOQ.

B. 1. The text of the ADEA leaves no room for an implied exception based on the treatment accorded similar federal employees. In addition to the general BFOQ defense, the Act contains certain limited exceptions for specified occupations, so Congress presumably would have similarly provided expressly for an exception based on treatment of analogous federal employees if it had desired to enact one. Moreover, established principles of statutory construction compel rejection of the court of appeals' reading of the statute. As an exception to a remedial statute permitting the very conduct the Act generally prohibits, the BFOQ defense should be narrowly construed. And the contemporaneous and consistent administrative interpretation of the BFOQ exception emphasizes the need for a factual showing of necessity and clearly reflects the view that age has not been established as a per se BFOQ for state and local firefighters.

The legislative history of the 1978 amendments to the ADEA establishes beyond doubt that Congress did not intend to recognize age as a BFOQ for local firefighters younger than 70, even though it retained the mandatory retirement provision for federal firefighters. The decision to retain 5 U.S.C. 8335(b) did not reflect any view of the merit of that provision; it was based solely on a desire to expedite passage of the ADEA while allowing the congressional committees with jurisdiction over the federal retirement programs at issue the opportunity to review those provisions. The sponsor of the amendment retaining federal mandatory retirement, and others who spoke in its support, specifically disclaimed the possibility that their proposal reflected approval of the mandatory retirement provisions.

EEOC v. *Wyoming*, *supra*, establishes that federal civil service statutes are not relevant to interpreting the ADEA. The Court there specifically rejected the State's contention that the federal statute demonstrated that the federal interest in the ADEA was insufficient to justify applying it to state employees, explaining that the ADEA must be read on its own terms, not by reference to other statutes. The Court stated (460 U.S. at 243 n.17): "Once Congress has asserted a federal interest, and once it has asserted the strength of that interest, we have no warrant for reading into the ebbs and flows of political decision-making a conclusion that Congress was insincere in that declaration * * *." The ADEA itself clearly establishes that mandatory retirement is permissible only if age is proven to be a BFOQ, and it clearly demonstrates that Congress deliberately drew distinctions between federal and nonfederal employees

(see 29 U.S.C. 630(b), 633a); hence, 5 U.S.C. 8335 (b) cannot be read as establishing a per se BFOQ for state employees under the ADEA.

2. In any event, 5 U.S.C. 8335(b) does not reflect a congressional finding that age is a BFOQ even for federal firefighters. The statute requires retirement at 55 only if the employee has 20 years of service, and his supervisor may waive the requirement; therefore, it is apparent that Congress recognized that firefighters can continue to perform effectively and safely after age 55 and that individualized determinations of fitness are possible.

The reasons underlying the enactment of the federal mandatory retirement provision confirm that it does not establish age as a BFOQ. One purpose was to preserve a young workforce for hazardous occupations, but Congress apparently relied on traditional age stereotypes in establishing mandatory retirement; it made no factual findings concerning the inability of older persons to perform their duties effectively (as the ADEA would require to establish a BFOQ). The other reasons for the legislation were to advance policies that have nothing to do with qualifications to serve as a firefighter. It is thus manifest that Congress did not find that age is a BFOQ for firefighters as that term is used in the ADEA, and therefore it is wholly inappropriate to read 5 U.S.C. 8335(b) as establishing a per se BFOQ for state employees. To the extent there is tension between the policies of the two statutes, that is a matter for Congress to resolve.

ARGUMENT

FEDERAL LAW DOES NOT PERMIT THE ESTABLISHMENT OF AGE 55 AS A MANDATORY RETIREMENT AGE FOR LOCAL FIREFIGHTERS IN THE ABSENCE OF A FACTUAL SHOWING THAT SUCH AN AGE LIMIT IS A BONA FIDE OCCUPATIONAL QUALIFICATION

The overriding purpose of the Age Discrimination in Employment Act is to eliminate unjustified denial of employment opportunities to older persons. The ADEA is designed to ensure that employment decisions are made on the basis of individual ability, rather than stereotypes based on age. See 29 U.S.C. 621(b). To that end, the Act generally prohibits the establishment of mandatory retirement ages under 70, with the exception that mandatory retirement is permitted if the evidence demonstrates that age is a bona fide occupational qualification for a given job.

The decision of the court of appeals seriously undermines this statutory purpose by upholding mandatory retirement for a large class of employees in the absence of evidence demonstrating that age is a BFOQ. The court's conclusion that this result was intended by Congress because an unrelated statute in some circumstances requires retirement of federal firefighers at age 55 is flawed in several respects. There is no basis for inferring that Congress desired the protections of the ADEA to be limited by the manner in which federal workers are treated. Indeed, as this Court recognized in *EEOC* v. *Wyoming*, 460 U.S. 226 (1983), the legislative history of the ADEA makes clear that Congress intended the ADEA to stand as an independent unit, unaffected by the provisions of federal civil service statutes. In any event, the federal statute relied upon by the court of appeals does not represent a congressional finding

that age is a BFOQ even for federal firefighters, and thus it can hardly be invoked to justify Baltimore's mandatory retirement age.

A. The ADEA Generally Prohibits Mandatory Retirement Prior to Age 70 Unless The Facts Demonstrate That Age Is A BFOQ

1. The ADEA is a remedial statute intended by Congress "to promote employment of older persons based on their ability rather than age * * *." 29 U.S.C. 621(b). When first enacted in 1967, the Act prohibited age discrimination, but it was interpreted to allow mandatory retirement provisions as part of a pension plan. See *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192 (1977). Concluding that "[m]andatory retirement works severe injustices against the aged" (S. Rep. 95-493, 95th Cong., 1st Sess. 3 (1977); EEOC, *Legislative History of the Age Discrimination in Employment Act* 436 (1981) (Leg. Hist.)), however, in 1978 Congress amended the ADEA to prohibit "the involuntary retirement of any individual [less than 70 years of age] * * * because of the age of such individual." 29 U.S.C. 623(f)(2). This amendment was deemed necessary to advance the statute's primary policy that "people should be treated in their employment on the basis of their individual ability to perform a job rather than on the basis of stereotypes about * * * age." S. Rep. 95-493, *supra*, at 3; Leg. Hist. 436. Thus, the mandatory retirement policy being defended by respondents here runs contrary to the "primary purpose" of the 1978 Amendments. H.R. Rep. 95-527, 95th Cong., 1st Sess., Pt. 1, at 1 (1977); Leg. Hist. 361.

The ADEA's prohibition against mandatory retirement prior to age 70 is not monolithic. The Act contains minor exemptions for certain employees in executive positions, who may be subject to mandatory retirement after age 65, and for state government policymakers. 29 U.S.C. 630(f), 631(c)(1).[10] And Congress recognized the possibility that other exemptions from its requirements might be found to be appropriate after further study; therefore the ADEA empowers the EEOC to "establish such reasonable exemptions to and from any or all provisions of [the Act] as [it] may find necessary and proper in the public interest." 29 U.S.C. 628.[11] The only exception to the prohibition against mandatory retirement that is of general applicability, however, is the BFOQ exception, which provides that a mandatory retirement age prior to 70 may be established if "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. 623(f)(1). See also 29 U.S.C. 633a(b) (EEOC can make BFOQ determinations for federal employees).

The BFOQ exception was established in order to accommodate unusual circumstances in which the general prohibitions of the ADEA ought not to ap-

[10] The 1978 amendments also added a provision that excepted tenured professors above age 65 from the mandatory retirement prohibition. Pub. L. No. 95-256, § 3(a), 92 Stat. 190. This provision was designed to exist for only a few years, and it automatically became repealed on July 1, 1982. Pub. L. No. 95-256, § 3(b)(3), 92 Stat. 190.

[11] Pursuant to this authority, the EEOC examined the desirability of fixing a retirement age for local firefighters and police officers. After preliminary study, the EEOC concluded that such an exemption from the Act was not appropriate because of, inter alia, the feasibility of making individualized assessments of fitness and the fact that age alone is a poor indicator of ability. See J.A. 5-23.

ply,[12] but it plainly was not intended to undermine the fundamental goal of the Act to eliminate employment decisionmaking based on age stereotypes rather than actual abilities. The exception was patterned after the BFOQ exception contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which this Court has described as an "extremely narrow exception." *Dothard* v. *Rawlinson*, 433 U.S. 321, 334 (1977). And the courts of appeals that have applied the BFOQ exception in ADEA cases have similarly recognized its narrow application. See, *e.g.*, *Orzel* v. *City of Wauwatosa Fire Dep't*, 697 F.2d 743, 748 (7th Cir. 1983), cert. denied, No. 83-205 (Nov. 28, 1983); *Smallwood* v. *United Air Lines, Inc.*, 661 F.2d 303, 307 (4th Cir. 1981), cert. denied, 456 U.S. 1007 (1982).

The test first set forth in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), for finding a BFOQ has been universally adopted by the other courts of appeals that have considered the question.[13] That test requires the employer to show that

[12] At the hearings on the ADEA, the Secretary of Labor recognized that there could be some instances in which age is relevant to job performance, and hence the BFOQ exception was included in the Act, but he advised Congress that those instances would occur rarely and that in almost all occupations individual assessments of ability could be made. *Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong., 1st Sess. 9 (1967); *Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 38, 51-52 (1967).

[13] See *Orzel* v. *City of Wauwatosa Fire Dep't*, 697 F.2d at 753; *Tuohy* v. *Ford Motor Co.*, 675 F.2d 842, 844-846 (6th Cir. 1982); *Stewart* v. *Smith*, 673 F.2d 485, 491 n.26 (D.C. Cir. 1982); *EEOC* v. *County of Santa Barbara*, 666 F.2d 373, 376 (9th Cir. 1982); *Arritt* v. *Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977); *Houghton* v. *McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), cert. denied, 434 U.S. 966 (1977). The BFOQ standard is currently under consideration by this Court in *Western Air Lines, Inc.* v. *Criswell*, No. 83-1545 (argued Jan. 14, 1985).

its job qualifications are "reasonably necessary" to its business and that it has a "factual basis" for believing either that all workers above a certain age are unqualified or that individual testing is not possible. 531 F.2d at 236. The requirement that the BFOQ exception be supported by a specific factual showing comports with Congress's intent that the "case-by-case basis should serve as the underlying rule in the administration of the [ADEA]" (H.R. Rep. 805, 90th Cong., 1st Sess. 7 (1967); S. Rep. 723, 90th Cong., 1st Sess. 7 (1967); Leg. Hist. 80, 111), thus furthering the goal of ending "the setting of arbitrary age limits regardless of potential for job performance" (29 U.S.C. 621(a)(2)).[14] Accord-

[14] Shortly after the ADEA was first enacted, the Department of Labor (the task of administering and enforcing the Act was transferred from the Department of Labor to the EEOC pursuant to Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978)) issued guidelines concerning the BFOQ defense (29 C.F.R. (1968 ed.) 860.102(b); 33 Fed. Reg. 9172 (1968)):

> Whether occupational qualifications will be deemed to be "bona fide" and "reasonably necessary to the normal operation of the particular business," will be determined on the basis of all the pertinent facts surrounding each particular situation. It is anticipated that this concept of a bona fide occupational qualification will have limited scope and application. Further, as this is an exception it must be construed narrowly, and the burden of proof

ingly, the courts have recognized that this prerequisite of a particularized evidentiary showing to establish a BFOQ is essential to maintaining the integrity of the statutory prohibition. See, *e.g.*, *Heiar* v. *Crawford County*, 746 F.2d 1190, 1197 (7th Cir. 1984); *EEOC* v. *County of Santa Barbara*, 666 F.2d 373, 376 (9th Cir. 1982).

In the course of considering the 1978 amendments to the ADEA, Congress confirmed its view that a factual showing of business necessity was a prerequisite to establishing a BFOQ defense for a broad rule requiring involuntary retirements. The Senate version of the 1978 amendments would have added to Section 4(f)(1) of the Act a phrase expressly making the BFOQ defense applicable to mandatory retirement provisions. See Leg. Hist. 474. While that amendment ultimately was not enacted, it was only because it was agreed that "the amendment neither added to nor worked any change upon present law," *i.e.*, the BFOQ provision in the statute was already applicable to mandatory retirement without the need for any amendment. H.R. Conf. Rep. 95-950, 95th Cong., 2d Sess. 7 (1978); Leg. Hist. 518; see *Trans World Airlines, Inc.* v. *Thurston*, No. 83-997 (Jan. 8, 1985), slip op. 10-11. Accordingly, the legislative history of this proposed 1978 amendment is instructive with respect to Congress's understanding of the

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in establishing that it applies is the responsibility of the employer, employment agency, or labor organization which relies upon it.

This contemporaneous administrative interpretation focusing on the factual nature of the BFOQ defense has been consistently adhered to, and was also adopted by the EEOC. 29 C.F.R. 1625.6; 46 Fed. Reg. 47727 (1981).

BFOQ defense contained in the statute. The Senate explained the defense as follows:

> For example, in certain types of particular arduous law enforcement activity, there may be a factual basis for believing that substantially all employees above a specified age would be unable to continue to perform safely and efficiently the duties of their particular jobs, and it may be impossible or impractical to determine through medical examinations, periodic reviews of current job performance and other objective tests the employees' capacity or ability to continue to perform the jobs safely and efficiently.
>
> Accordingly, the committee adopted an amendment to make it clear that where these two conditions are satisfied and where such a bona fide occupational qualification has therefore been established, an employer may lawfully require mandatory retirement at that specified age.

S. Rep. 95-493, 95th Cong., 1st Sess. 10-11 (1977); Leg. Hist. 443-444. Thus, even with respect to hazardous occupations like the one involved in this case, Congress contemplated that a BFOQ defense could be established only upon a specific factual showing—along the lines of the *Tamiami* test—that the age limit is necessary. See also H.R. Rep. 95-527, 95th Cir., 1st Sess., Pt. 1, at 12 (1977); 123 Cong. Rec. 34296 (1977) (remarks of Sen. Javits); Leg. Hist. 372, 483. In sum, the decision below flies in the face of the explicit requirements and manifest thrust of the ADEA by finding the existence of a BFOQ for a large class of employees without actual evidence that a mandatory retirement age is necessary for the job.

2. The court of appeals sought to justify this untoward result by relying on a passage in *EEOC* v. *Wyoming*, *supra*, but the court of appeals' analysis

misunderstands the import of this Court's decision in that case. In *Wyoming*, the Court rejected the state's contention, based on *National League of Cities* v. *Usery*, 426 U.S. 833 (1976),[15] that the Tenth Amendment was violated by the application of the ADEA to employment practices of state and local governments (in that case, to the job of game warden) because of interference with "traditional governmental functions." The Court explained that the ADEA did not unduly intrude into the exercise of such government functions because it did not require employers to retain unfit employees; it at most required them to make individualized judgments concerning fitness for duty. 460 U.S. at 239. The Court then added that, because of the BFOQ defense, the ADEA did not even necessarily require the state to make such individualized determinations. The Court stated (*id.* at 240 (emphasis in original)):

> Perhaps more important, appellees remain free under the ADEA to continue to do *precisely what they are doing now*, if they can demonstrate that age is a "bona fide occupational qualification" for the job of game warden. * * * Thus, * * * even the State's discretion to achieve its goals *in the way it thinks best* is not being overridden entirely, but is merely being tested against a reasonable federal standard.

Accordingly, the Court remanded the case, giving the State of Wyoming the opportunity to prove at trial that the age limit was a BFOQ for the job of game warden.

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[15] This Court recently overruled *National League of Cities*. *Garcia* v. *San Antonio Metropolitan Transit Authority*, No. 82-1913 (Feb. 19, 1985).

The court of appeals below erroneously seized upon the phrase "reasonable federal standard" in this discussion. The court stated that, in light of *Wyoming*, it was required to "initiate a search for a 'reasonable federal standard' by which to test" whether age is a BFOQ for Baltimore firefighters (Pet. App. 6a). The court's search then settled on the federal civil service statute for federal firefighters, 5 U.S.C. 8335(b), and the court concluded that the "federal standard" established age 55 as a BFOQ for all firefighters.

This analysis completely misconceives this Court's reference in *Wyoming*. The context of the Court's discussion makes it unmistakably clear that the "reasonable federal standard" referred to was that supplied by the ADEA itself—whether the age limit is a BFOQ within the meaning of Section 4(f)(1). Thus, the Court in *Wyoming* was simply acknowledging that the State did have the opportunity to preserve its mandatory retirement age by making a factual showing that the age limit was necessary to the functioning of the state game warden system.[16] *Wyoming* merely confirms the scheme set forth in the text of the ADEA; it provides no avenue for avoiding that scheme.

As explained above, the ADEA is structured to prohibit age discrimination, including mandatory retirement, unless the employer can show that "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. 623(f)(1). The court of appeals' view that in each case the court should search for

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[16] In fact, the State of Wyoming ultimately was able to make this showing successfully. On remand, a jury found that age 55 was a BFOQ for game wardens in Wyoming. See Pet. App. 6a n.7; *EEOC* v. *Wyoming*, No. C 80-0336 B (D. Wyo. Nov. 18, 1983).

some other "reasonable federal standard" to apply to the particular fact situation at hand substitutes chaos for the uniform legal standard established in the ADEA.[17] It is manifest that the Court in *Wyoming* did not intend to create such chaos, and nothing in *Wyoming* in any way supports the court of appeals' decision to exempt respondents from the ADEA's requirement that mandatory retirement be permitted only when the facts demonstrate the necessity for an age limit as a bona fide occupational qualification.

B. The Retirement Provisions Governing Federal Firefighters Do Not Establish Age As A BFOQ For All Firefighters

1. *Congress Did Not Intend That The Requirements Of The ADEA Would Be Circumscribed By The Treatment Afforded Federal Employees*

a. By its terms, the ADEA prohibits mandatory retirement unless a BFOQ is established. The ADEA contains no language even suggesting that the treatment accorded federal employees is of any relevance

[17] The court of appeals reasoned that "the risk of differing results, case-by-case" (Pet. App. 15a n.22) justified its strained interpretation of the statute. But the possibility of "differing results, case-by-case," if based on different evidence, is precisely what Congress intended. See H.R. Rep. 805, *supra*, at 7; S. Rep. 723, *supra*, at 7; Leg. Hist. 80, 111. The court of appeals overstepped its authority by seeking to promote its own concept of uniformity at the expense of the dictates of the statute. See *Mobil Oil Co.* v. *Higginbotham*, 436 U.S. 618, 624 (1978); *Executive Jet Aviation* v. *City of Cleveland*, 409 U.S. 249, 273-274 (1972). Moreover, the court of appeals' approach, involving an ill-defined search for a "reasonable federal standard" in each case, would undermine the uniformity of the statutory standard prescribed by the ADEA and produce differing results not intended by Congress.

in interpreting its requirements. Indeed, the ADEA expressly differentiates federal employees from private and state and local government employees; Section 11(b), 29 U.S.C. 630(b), provides that "employer" under the Act includes "a State or political subdivision of a State and any agency or instrumentality of a State * * *, but such term does not include the United States * * *."[18] Thus, the "plain meaning" of the statute leaves no room for respondents' contention that the ADEA does not prohibit Baltimore's mandatory retirement provision simply because some federal firefighters are subject to retirement at age 55. See, *e.g.*, *Garcia* v. *United States*, No. 83-6061 (Dec. 10, 1984), slip op. 5; *United States* v. *Clark*, 454 U.S. 555, 560 (1982). The incompatibility of respondents' contention with the text of the statute is magnified by the fact that Congress did enact in 1978 provisions excepting certain types of employees from some of the ADEA's requirements. See 29 U.S.C. 630(f), 631(c)(1); note 10, *supra*. Thus, if Congress had wished to exempt firefighters or other state employees from the mandatory retirement prohibition on the basis of the treatment accorded similar federal employees, it certainly knew how to do so expressly. See *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103, 118 (1983); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 784 n.14 (1981).[19]

[18] Federal employees are covered by a separate section of the Act. § 15, 29 U.S.C. 633a. See pages 33-34, *infra*.

[19] A bill (S. 2425) was introduced in the last Congress to exempt state law enforcement officers from the ADEA's proscription of mandatory retirement. See 130 Cong. Rec. S2707-S2708 (daily ed. Mar. 14, 1984). The bill was never reported out of committee.

The other guides ordinarily used to construe a statute similarly indicate that retirement statutes for federal employees do not by implication establish age as a BFOQ under the ADEA for similar state employees. Because the BFOQ provision is an exception to a remedial statute and permits the very conduct that the statute generally was designed to prohibit, established principles of construction require that the exception should be read "narrowly" and should be invoked only if an employer proves "plainly and unmistakably" that it is entitled to the benefit of the exception. *A.H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945). Moreover, the court of appeals' interpretation runs contrary to the consistent construction of the statute by the agency charged with its administration; that interpretation is entitled to considerable deference. See, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Shortly after the ADEA was enacted, the Department of Labor issued guidelines providing that the BFOQ defense "will be determined on the basis of all the pertinent facts surrounding each particular situation." 33 Fed. Reg. 9172 (1968); see note 14, *supra*. Pursuant to these guidelines, the agency administering the ADEA has always taken the position that mandatory retirement ages for police and firefighters violate the Act unless a factual showing of a BFOQ is made. See J.A. 5-6.[20]

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[20] The original Department of Labor guidelines on BFOQs issued in 1968 gave as illustrations of possible BFOQs "[f]ederal statutory and regulatory requirements which provide compulsory age limitations for hiring or compulsory retirement * * * when such conditions are clearly imposed for the safety and convenience of the public." 33 Fed. Reg. 9172 (1968); see Br. in Opp. 7-8. The guidelines gave as an example the Federal Aviation Administration's rule prohibiting persons over age 60 from serving as pilots. When the EEOC adopted these guidelines, it removed this reference and all other examples in order "to avoid the appearance that those examples had received the imprimatur of the Commission." 46 Fed. Reg. 47724, 47725 (1981); see *Trans World Airlines, Inc.* v. *Thurston*, slip op. 10 n.17. Even the original version of the guidelines lends no support to respondents' position that 5 U.S.C. 8335(b) establishes age 55 as a BFOQ for local firefighters, however, because the guidelines refer only to federal requirements applicable to the employees in question; unlike private commercial pilots who are subject to the FAA's Age 60 Rule, the plaintiffs here are not covered by 5 U.S.C. 8335(b). The guidelines adopted by the EEOC and in effect today make clear that age limitations in state and local laws are "effectively superseded by the ADEA * * * [unless] these laws meet the standards for the establishment of a valid [BFOQ]." 29 C.F.R. 1625.6(c).

Indeed, the EEOC has studied whether it should establish administratively a permissible mandatory retirement age for police or firefighters (see note 11, *supra*), an effort that plainly reflects as its premise the agency's understanding that the ADEA itself contains no exception derived from the federal firefighters retirement statute.[21]

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[21] The court of appeals stated that its strained statutory interpretation was compelled by the need to avoid "serious constitutional questions" (Pet. App. 9a-14a). As noted by Chief Judge Winter in his dissent (*id.* at 20a n.3) and discussed at greater length in our petition (Pet. 12-13 n.7), this suggestion of constitutional difficulties was seriously mistaken even when made. The constitutional power of Congress under the Commerce Clause to extend the ADEA to state law enforcement officials was upheld in *EEOC* v. *Wyoming*, *supra*, and nothing in that decision would support a different result for firefighters than for game wardens.

In any event, the contention that this case presents a potential constitutional problem under *National League of Cities*

b. The legislative history of the 1978 amendments to the ADEA removes any conceivable doubt over the effect of federal civil service statutes on the requirements of the Act. The legislative history reveals that the decision to retain mandatory retirement provisions for certain federal employees resulted from an agreement to provide the congressional committees with jurisdiction over the retirement programs at issue the opportunity to review those provisions. In order to expedite the passage of the ADEA, it was agreed to preserve the existing federal mandatory retirement provisions for further study, rather than delaying the ADEA while the appropriate committees considered the specific mandatory retirement provisions within their jurisdiction. See 123 Cong. Rec. 29003-29004 (1977); Leg. Hist. 400-401. The decision to preserve these provisions in 1978 thus clearly did not reflect a congressional finding that mandatory retirement was appropriate for nonfederal employees in similar occupations.

As reported out of committee, the original ADEA bill removed all age limitations on federal employment "notwithstanding any other provisions of federal law relating to mandatory retirement requirements * * *." H.R. 5383, 95th Cong., 1st Sess. 5 (1977); Leg. Hist. 396. During House consideration

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v. *Usery*, 426 U.S. 833 (1976), is now foreclosed by the overruling of that decision in *Garcia* v. *San Antonio Metropolitan Transit Authority, supra*. Taken together, *Wyoming* and *Garcia* leave no basis for contending that the ADEA "is destructive of state sovereignty or violative of any constitutional provision." *Garcia*, slip op. 25. Accordingly, the application of the ADEA to this case must be judged on its own terms, not by resort to the spectre of avoiding possible constitutional questions.

of the bill, however, Representative Spellman offered an amendment, on behalf of the House Post Office and Civil Service Committee, to retain the mandatory retirement provisions for certain federal employees, including firefighting personnel. In introducing the amendment, Representative Spellman stated:

> I hasten to point out that this amendment does not indicate opposition perse [*sic*] to elimination of mandatory retirement for air traffic controllers, firefighters, and other specific occupations.
>
> However, since most of these mandatory retirement provisions are part of liberalized retirement programs, our committee believes that such provisions should not be repealed until the individual retirement programs have been reexamined.
>
> The amendment will provide the opportunity for review of these retirement programs and their mandatory retirement provisions.

123 Cong. Rec. 30556 (1977); Leg. Hist. 415.

Representative Hawkins, Chairman of the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, stated in agreeing to the amendment (*ibid.*):

> By this action we are not reaffirming the mandatory retirement ages in the statutes applicable to these positions. The sole purpose of this agreement is to afford the committees the opportunity to review their statutes.

See also 123 Cong. Rec. 29002 (1977); Leg. Hist. 399. Representative Pepper, another sponsor of the 1978 ADEA amendments, reiterated this point (123 Cong. Rec. 30556 (1977); Leg. Hist. 415):

> For the record, * * * I should state what might appear to be obvious That we in the House, in debating and passing this [Spellman] amendment, are making no judgment whatever on the desirability of retaining the ages now established by the various statutes affected for forced retirement.

See *Vance* v. *Bradley*, 440 U.S. 93, 97 n.12 (1979).[22]

In sum, the retention of federal mandatory retirement provisions for certain employees in 1978 was a result of congressional caution and intended to avoid procedural delays that would be caused by the division of jurisdiction between House committees.[23] The preservation of these civil service statutes plainly did not represent any factual determination by Con-

[22] Accordingly, the sections of 5 U.S.C. 8335 relating to mandatory retirement were retained when the 1978 Amendments were enacted. Pub. L. No. 95-256, § 5(c), 92 Stat. 191. There is no direct mention of these retirement provisions, however, in Section 15 of the ADEA, 29 U.S.C. 633a, which extends the Act to federal employees. Several courts have ruled that the specific statutory age restrictions of the existing civil service statutes were not superseded by Section 15 of the ADEA and remain in force. See *Stewart* v. *Smith*, 673 F.2d 485 (D.C. Cir. 1982) (maximum hiring ages permitted by 5 U.S.C. 3307); *Bowman* v. *United States Dep't of Justice, Federal Prison System*, 510 F. Supp. 1183, 1186 (E.D. Va. 1981) (mandatory retirement for law enforcement officers under 5 U.S.C. 8335(b)); *Bradley* v. *Kissinger*, 418 F. Supp. 64, 68-69 (D.D.C. 1976), aff'd on other grounds *sub nom. Vance* v. *Bradley*, *supra* (Foreign Service Act provision for mandatory retirement).

[23] Representative Findley, a cosponsor of the bill, stated that the Spellman amendment was "necessary in order to expedite consideration of this major step forward in eliminating age discrimination." 123 Cong. Rec. 30556 (1977); Leg. Hist. 415.

gress that they met the BFOQ standards of the ADEA or even that their retention was good policy. Indeed, the nature of the original bill reported out of committee and the discussion surrounding its amendment suggests that Congress recognized that the federal mandatory retirement provisions might well be at odds with the ADEA, and it determined to reconsider whether they should be perpetuated. Under no circumstances does their preservation in 1978 reflect a decision by Congress implicitly to curtail the employment protections expressly conferred on nonfederal employees by the ADEA.

c. Indeed, this Court has already repudiated the idea that the federal civil service statutes are relevant to interpreting the ADEA. In *EEOC* v. *Wyoming*, the State had argued (see No. 81-554, 1982 Term, Appellee's Brief at 13-14, 19), and the district court had found (514 F. Supp. 595, 597 (D. Wyo. 1981)), that the civil service statutes containing mandatory retirement provisions, notably 5 U.S.C. 8335(b), demonstrated that there was not a sufficient federal interest in the prohibitions of the ADEA to satisfy the constitutional standards for imposing them on state and local governments. The Court rejected that suggestion, explaining (460 U.S. at 243 n.17): "Once Congress has asserted a federal interest, and once it has asserted the strength of that interest, we have no warrant for reading into the ebbs and flows of political decisionmaking a conclusion that Congress was insincere in that declaration * * *." In other words, the Court confirmed that the ADEA stands on its own; it is to be examined according to its own terms, not by reference to what Congress has done in other federal statutes. Cf. *United States* v. *Hopkins*, 427 U.S. 123, 126 (1976) (employees cov-

ered by terms of statute not removed from its effect by reference to other laws dealing with federal employees). As Chief Judge Winter correctly stated in his dissent (Pet. App. 20a), this conclusion completely undermines the linchpin of the decision below, namely, the assertion that the substance of the BFOQ defense contained in the ADEA should be altered by reference to a preexisting statute relating solely to federal employees, 5 U.S.C. 8335(b).[24]

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[24] While the litigation in *Wyoming* did not focus on the BFOQ defense, the possibility of a BFOQ defense as a matter of law based on 5 U.S.C. 8335(b) was adverted to in questioning at oral argument in this Court (Tr. of Oral Argument 7-8, 30-32). Under the decision below, the State of Wyoming should have been entitled to a BFOQ defense as a matter of law because of 5 U.S.C. 8335(b). That section applies not only to firefighters, but also to federal law enforcement officers. As the district court in *Wyoming* found (514 F. Supp. at 597), game wardens in Wyoming are considered law enforcement officers authorized to enforce the criminal provisions of Wyoming's fish and game laws. See Wyo. Stat. § 7-2-101 (Supp. 1984); *id.* § 23-6-101 (1977). Similarly, federal game wardens are "law enforcement officers" within the meaning of 5 U.S.C. 8335(b). See 5 U.S.C. 8331(20); Letter from Warren B. Irons, Chief, Retirement Division, U.S. Civil Service Commission to J. Atwood Maulding, Director of Personnel, U.S. Dep't of Interior (Feb. 2, 1949) (appended to the EEOC's petition for rehearing). The Court in *Wyoming* was well aware of the existence of 5 U.S.C. 8335(b) (see 460 U.S. at 243 n.17; *id.* at 263 (Burger, C.J., dissenting)), but it nevertheless remanded the case with the manifest expectation that the State would have to demonstrate at trial that age 55 was a BFOQ for game wardens. See 460 U.S. at 240. Thus, the Court's disposition in *Wyoming* is inconsistent with the court of appeals' conclusion here that age 55 has been established as a per se BFOQ for all state employees who can be said to perform the same duties as federal employees covered by 5 U.S.C. 8335(b).

The court of appeals' contrary decision to read 5 U.S.C. 8335(b) into the BFOQ exception in the ADEA rested in part upon its apparent perception that there is something inherently wrong about differences in treatment of federal and local firefighters (see Pet. App. 7a-8a). That view is quite mistaken, however, as the above discussion in *Wyoming* necessarily recognizes. As a minimum, it is clear that Congress may attack a problem—such as age discrimination—in one area without acting in all related areas. See, *e.g.*, *Minnesota* v. *Clover Leaf Creamery*, 449 U.S. 456, 466 (1981) (state legislation); *Cleland* v. *National College of Business*, 435 U.S. 213, 220 (1978); *Katzenbach* v. *Morgan*, 384 U.S. 641, 657 (1966); see also *Mahoney* v. *Trabucco*, 738 F.2d 35, 41 (1st Cir. 1984). More particularly, the fact that Congress implements a particular policy in the federal sector does not generally mean that it intended to authorize a similar policy in the state sector. See *South-Central Timber Development, Inc.* v. *Wunnicke*, No. 82-1608 (May 22, 1984), slip op. 10.

With respect to the ADEA, it is manifest that Congress intended to treat federal employees differently from other employees in numerous respects apart from the differences in retirement provisions for firefighters. Federal employees are specifically excluded from the provisions of the ADEA applicable to other employees (§ 11, 29 U.S.C. 630)); instead they are covered by an independent section with its own enforcement mechanisms (§ 15, 29 U.S.C. 633a). This framework establishes significant disparities in treatment between federal and nonfederal employees. For example, although 29 U.S.C. 626(c)(2) generally confers a right to jury trial for ADEA claims, federal employees do not have such a right.

Lehman v. *Nakshian*, 453 U.S. 156 (1981). In addition, the ADEA excepts from its prohibitions certain high-level executive positions (beyond age 65) (29 U.S.C. 631(c)) and state government policymaking positions (29 U.S.C. 630(f)); there are no comparable exemptions for high-level federal policymakers. Most significantly, the general prohibitions of the ADEA apply only between the ages of 40 to 70, but this 70-year ceiling does not apply to the federal government. See 29 U.S.C. 631(a) and (b). Thus, federal employees in most occupations cannot be forced to retire at any age, while similarly situated private and state and local government employees may be forced to retire at age 70.

Especially against this background of disparate treatment, there is no reason to suppose that Congress would have intended to excuse state and local governments from satisfying the BFOQ standards established by the ADEA simply because an existing statute provided for mandatory retirement for some federal firefighters. Congress determined in enacting the ADEA that the prohibitions against age discrimination generally should be subject only to a narrow, factually-based BFOQ exception; it is unobjectionable for Congress to apply those prohibitions to state and local governments as well as to private employers. See *Garcia* v. *San Antonio Metropolitan Transit Authority*, No. 82-1913 (Feb. 19, 1985), slip op. 25-26.[25]

[25] Congress, of course, frequently enacts remedial legislation that by its terms is not applicable to federal employees. See, *e.g.*, 26 U.S.C. 3306(c)(6) (unemployment compensation); 29 U.S.C. 152(2) (labor relations). This reflects the fact that Congress can directly supervise the employment relationship with federal workers and treat them uniformly; it therefore need not include them in broad brush legislation that it might otherwise deem required to attack a problem nationwide.

The courts of appeals that have considered the question have generally concluded, in accord with this Court's decision in *Wyoming*, that federal retirement statutes do not establish age as a per se BFOQ for state and local government employees. In *Orzel* v. *City of Wauwatosa Fire Dep't*, *supra*, the court rejected the precise contention made here—that 5 U.S.C. 8335(b) establishes age 55 as a BFOQ for firefighters. The court explained that Congress's decision that "age 55 is an appropriate retirement age for one group of firefighters does not automatically establish that the same retirement age is a valid BFOQ, under * * * the ADEA, for a wholly different group of employees." 697 F.2d at 749. The court of appeals concluded that the City could establish its BFOQ defense only by means of "objective and credible evidence" at trial. *Id.* at 750. See also *Heiar* v. *Crawford County*, 746 F.2d at 1197-1200 (following *Orzel* and noting and rejecting the decision below); *Galvin* v. *Vermont*, 598 F. Supp. 144, 149-150 (D. Vt. 1984) (rejecting the decision below and relying on *Wyoming* to hold that 5 U.S.C. 8335(b) does not establish BFOQ as a matter of law); *EEOC* v. *Commonwealth of Pennsylvania*, 596 F. Supp. 1333, 1339-1340 (M.D. Pa. 1984), appeal docketed, No. 84-5743 (3d Cir. Nov. 6, 1984) (same); but cf. *EEOC* v. *Missouri Highway Patrol*, 748 F.2d 447, 455-456 (8th Cir. 1984) (finding that expert testimony at trial established age 60 as a BFOQ under *Tamiami* test but also noting that 5 U.S.C. 8335(b) was "persuasive" evidence).[26]

[26] Other courts have rejected the contention that age is a per se BFOQ for firefighters, without specifically addressing

In *EEOC* v. *County of Los Angeles*, 706 F.2d 1039 (9th Cir. 1983), cert. denied, No. 83-332 (Jan. 16, 1984), the county argued that its maximum hiring age of 35 for helicopter pilots and deputy sheriffs was a BFOQ, relying on the maximum hiring age established in 5 U.S.C. 3307(d) for similar federal occupations. The court of appeals ruled against the county, finding that this argument had been considered and rejected in *Wyoming*. 706 F.2d at 1041-1042. In *Tuohy* v. *Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982), the court of appeals ruled that the FAA's Age 60 Rule (see note 20, *supra*), which applies only to commercial airline pilots, did not establish that age as a BFOQ for private pilot employees not covered by the regulation.[27] See also *Mahoney* v. *Trabucco*, 738 F.2d at 41; *Stewart* v. *Smith*, 673 F.2d 485, 492-494 (D.C. Cir. 1982).

2. *Congress Has Never Found That Age Is A BFOQ For Firefighters, Even Those Covered By 5 U.S.C. 8335(b)*

Quite apart from the fact that Congress did not intend that its treatment of federal employees would govern application of the BFOQ exception in the

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the relevance of the federal statute. See *EEOC* v. *City of St. Paul*, 671 F.2d 1162, 1166-1167 (8th Cir. 1982); *Aaron* v. *Davis*, 414 F. Supp. 453, 460-463 (E.D. Ark. 1976).

[27] In *Gathercole* v. *Global Associates*, 727 F.2d 1485 (1984), the Ninth Circuit recently upheld the mandatory retirement of a pilot at age 60 by a government contractor that had contracted with the Army to adhere to the FAA's Age 60 Rule for pilots. The court of appeals held that a BFOQ defense was available, not because the FAA rule should be applied to all pilot positions, but because the rule had been made directly applicable by government contract to the pilot position in that case. *Id.* at 1488.

ADEA to state employees, the court of appeals also erred in its underlying premise that Congress had found that age 55 was a BFOQ for federal firefighters. It is quite clear that 5 U.S.C. 8335(b) does not represent a determination by Congress that age 55 is a bona fide occupational qualification for the federal employees covered by that statute. As Chief Judge Winter explained in his dissent (Pet. App. 17a-18a), the federal statute does not unconditionally require retirement at age 55. Firefighters are not subject to mandatory retirement under 5 U.S.C. 8335 (b) unless they have completed 20 years of service and, even in that case, they may be retained at the option of the head of the agency until age 60. The President (whose authority in this regard has been delegated to the Office of Personnel Management, 5 C.F.R. 831.503(c)), may exempt an employee from automatic separation at any age. 5 U.S.C. 8335(d). Thus, the statute clearly contemplates that some firefighters will continue to work past the age of 55. See also *Heiar* v. *Crawford County*, 746 F.2d at 1199. Unless Congress intended to authorize firefighters whom it believed to be unqualified to continue in their jobs, this scheme is logically inconsistent with a determination by Congress that age 55 is a BFOQ for the job of firefighter. To the contrary, the statute indicates that Congress recognized that firefighters can continue to perform effectively and safely after age 55 and that individualized determinations of fitness are possible.

The history of 5 U.S.C. 8335(b) confirms that its age 55 provision does not represent a congressional determination that that age is a BFOQ for firefighters. Early retirement for selected federal employees began in 1947 with a special program for FBI agents

that allowed retirement at age 50 at an enhanced annuity. Act of July 11, 1947, ch. 219, 61 Stat. 307. The goal of this program was at least twofold: (1) to keep the FBI a "young man's service" partly because of the "many pressures, risks and hazards" that were perceived as making it harder for older agents to carry out their duties; and (2) to "stabilize the Federal Bureau of Investigation into a career service" by providing an incentive for young agents to stay with the FBI rather than seeking other employment. S. Rep. 76, 80th Cong., 1st Sess. 2-4 (1947). In 1948, this program was extended to other federal law enforcement personnel (Act of July 2, 1948, ch. 807, 62 Stat. 1221), and in 1972 it was extended to firefighters (Act of Aug. 14, 1972, Pub. L. No. 92-382, 86 Stat. 539).

In 1974, the statute was amended to provide for mandatory retirement. As with the earlier statutes establishing a voluntary early retirement program, one goal of the amendment was to ensure a "young" workforce that would be "physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service." S. Rep. 93-948, 93d Cong., 2d Sess. 2 (1974). Congress, however, considered little specific evidence and made no factual findings with respect to the ability of older employees to cope with these demands. Thus, to the extent the mandatory retirement provision was intended to reflect a concern about performance of duties, it appears to be an example of the sort of age stereotyping without factual basis that was one of the primary targets of the reforms of the ADEA. See, *e.g.*, S. Rep. 95-493, *supra*, at 3; 112 Cong. Rec. 20821 (1966) (statement of Sen. Javits); Leg. Hist. 52, 436; see generally *EEOC* v.

Wyoming, 460 U.S. at 231.[28] It would therefore be entirely antithetical to the purposes of the ADEA for such a federal mandatory retirement statute—not based on factual consideration of age as an occupational qualification—to be held to establish a per se BFOQ exception for state and local government employees (or any other employees) protected by the ADEA.[29]

Moreover, Congress also advanced other reasons for establishing mandatory retirement in 5 U.S.C. 8335 (b)—reasons that have nothing whatever to do with qualification for employment as a firefighter. Congress found that the voluntary early retirement program was having an adverse effect on the quality of older federal employees because the "more alert and aggressive employees" had been retiring early to "desirable jobs outside the Government" while the less able employees were remaining at their jobs until age 70. H.R. Rep. 93-463, 93d Cong., 1st Sess. 3-4 (1973). In addition, as with the original 1947 legislation, the financial incentives accompanying early re-

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[28] Moreover, Congress has not acted with complete consistency on the specific subject of retirement ages for firefighters. For many years, the law governing the District of Columbia Fire Department has provided for mandatory retirement at age 60 (in the discretion of the Mayor). See D.C. Code Ann. § 4-618 (1981). In 1970, Congress passed several amendments to this law (Pub. L. No. 91-509, 84 Stat. 1136-1137), but did not amend this mandatory retirement provision.

[29] Congress did not refer to the ADEA in the course of its 1974 consideration of the mandatory retirement provisions of 5 U.S.C. 8335(b). The fact that it plainly did not focus on the terms of the ADEA at this time also makes it highly inappropriate to invoke 5 U.S.C. 8335(b) to modify the plain meaning of the ADEA. See *Diamond* v. *Chakrabarty*, 447 U.S. 303, 314 (1980).

tirement were intended to induce younger employees to remain in federal service, which would reduce turnover and training costs, and to reward employees for having done hazardous work. *Id.* at 4. Another reason given for mandatory retirement was to enable management to "retire, without stigma, one who suffers loss of proficiency." *Retirement for Certain Hazardous Duty Personnel: Hearing on H.R. 6078 and H.R. 9281 Before the Subcomm. on Compensation and Employment Benefits of the Senate Comm. on Post Office and Civil Service*, 93d Cong., 2d Sess. 134 (1974) (testimony of Rep. Brasco, sponsor of House bill). Because these reasons for enacting the retirement provision are not addressed to occupational qualifications, it is apparent that 5 U.S.C. 8335(b) does not represent a congressional finding that age is a BFOQ for federal firefighters, much less firefighters in the City of Baltimore.[30]

There is unquestionably considerable tension between the policies reflected in the ADEA and the federal mandatory retirement provision of 5 U.S.C.

[30] By contrast, in the ADEA Congress determined that such countervailing policies must yield to the need to prevent older workers from being unfairly deprived of employment opportunities. Accordingly, numerous courts have held that economic considerations, such as reducing training costs, cannot be used to justify mandatory retirement under the ADEA on the theory that age is a BFOQ. See, *e.g.*, *EEOC* v. *City of Altoona*, 723 F.2d 4, 7 (3d Cir. 1983); *Smallwood* v. *United Air Lines, Inc.*, 661 F.2d at 307. And the legislative history of the 1978 amendments to the ADEA specifically indicates Congress's rejection of the idea that mandatory retirement can be justified by the desire to eliminate the stigma of forced termination for lack of productivity. See Select Comm. on Aging, 95th Cong., 1st Sess., *Mandatory Retirement: The Social and Human Cost of Forced Idleness* 35 (Comm. Print 1977); Leg. Hist. 344.

8335(b). The inconsistency between the reasons given for the latter statute and Congress's approach to the ADEA is a striking example of the "ebbs and flows of political decisionmaking" (*EEOC* v. *Wyoming*, 460 U.S. at 243 n.17). But it is not proper for the judiciary to undertake to resolve this tension by altering the plain terms of the ADEA. Congress has established the nature of the BFOQ defense in that Act, and 5 U.S.C. 8335(b) provides no basis for finding that the requirements of the defense have been met in this case. It is for Congress, not the courts, to reconcile the policies of the two statutes if it concludes that such action is appropriate.[31]

[31] After the 1978 amendments were enacted, Representative Spellman's Subcommittee on Compensation and Employee Benefits of the Committee on Post Office and Civil Service held hearings on the retirement provisions of 5 U.S.C. 8335(b). The committee heard testimony both in favor and opposed to the mandatory retirement provision. The committee also considered a General Accounting Office study, *Report to the House Comm. on Post Office and Civil Service by the Comptroller General of the United States: Special Retirement Policy for Federal Law Enforcement and Firefighter Personnel Needs Reevaluation* (Feb. 24, 1977), which found that "[r]etirement policies that disregard differences in physical abilities and productive capacity are costly and wasteful." *Id.* at 10. The report further noted that medical tests of employees and performance reviews of older employees demonstrated that many older employees subject to early retirement could continue to perform their duties satisfactorily. *Id.* at 10-11. After the hearings were completed, however, the subcommittee took no action to change the mandatory retirement law.

Recently, mandatory retirement ages for law enforcement personnel have been harshly criticized in Congress. A new report, Chairman, House Select Comm. on Aging, 98th Cong., 2d Sess., *The Myths and Realities of Age Limits for Law Enforcement and Firefighting Personnel* (Comm. Print 1984),

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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asserts that "*it is impossible to justify mandatory retirement or maximum hiring age policies based on arguments of public safety or job-related performance.*" *Id.* at iv (emphasis in original). The report concludes that "[m]andatory retirement of competent law enforcement officers is unnecessary and wasteful" and criticizes "[t]he federal government's failure to recognize this problem." *Id.* at 24.

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